89-597

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAY E. GREGORY, *et al.*,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DECISION ON THE FOURTH CIRCUIT IN UNITED STATES V. GREGORY, 871 F.2d 1239 (4th Cir. 1989) (HEREINAFTER "THE PANEL DECISION"), IN REVERSING THE FACTUAL FINDINGS OF THE DISTRICT COURT BY WEIGHING THE EVIDENCE DIFFERENTLY FROM THE DISTRICT COURT, AND WHERE THE DISTRICT COURT FINDINGS ARE SUPPORTED BY EVIDENCE IN THE RECORD AND NECESSARILY INVOLVE CREDIBILITY DETERMINATIONS, SO FAR DEPART FROM THE USUAL AND CUSTOMARY COURSE OF JUDICIAL PROCEEDINGS PERTAINING TO THE APPLICATION OF THE "CLEARLY ERRONEOUS STANDARD" OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

A. DOES THE PANEL DECISION SO FAR DEVIATE FROM THE USUAL AND CUSTOMARY COURSE OF JUDICIAL PROCEEDINGS IN THE APPLICATION OF APPELLATE STANDARDS OF REVIEW OF THE DISTRICT COURT'S SCRUTINY OF STATISTICAL EVIDENCE OFFERED TO PROVE SEX DISCRIMINATION UNDER TITLE VII (42 U.S.C. 2000 et seq.) AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

B. DID THE PANEL USURP THE FUNCTION OF THE FACT FINDER BY DENYING THE PETITIONERS THE OPPORTUNITY TO PRESENT EVIDENCE IN REBUTTAL TO TESTIMONY CONCERNING ALLEGED ADMISSIONS MADE BY PETITIONERS' ATTORNEY?

II.- IS THE EVIDENCE RELIED UPON BY THE PANEL SUFFICIENT, STANDING ALONE, TO SHIFT THE BURDEN OF PRODUCTION TO THE PETITIONERS AND TO SUSTAIN THE PANEL'S FINDING THAT THE PETITIONERS UNLAWFULLY DISCRIMINATED AGAINST WOMEN - IN THEIR EMPLOYMENT DECISIONS?

PARTIES

The parties to the proceedings are set forth as follows:

Jay E. Gregory, Sheriff of Patrick County, A Constitutional Officer of the Commonwealth of Virginia and Elected Under the Laws of the Commonwealth,

and

Jesse Williams, formerly Sheriff of Patrick County, in his official capacity,

Petitioners,

and

United States of America,

Respondent.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1989

JAY E. GREGORY, Sheriff of Patrick County, A Constitutional Officer of the Commonwealth of Virginia and Elected Under the Laws of the Commonwealth,

and

JESSE WILLIAMS, formerly Sheriff of Patrick County, in his official capacity,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS

- OPINIONS BELOW -

The Petitioners (hereinafter "the Sheriff") represent unto this Court that they are aggrieved by the Panel

decision reported below as United States v. Gregory, 871 F.2d 1239 (4th Cir. 1989). That decision reversed a judgment in favor of the Sheriff by the United States District Court for the Western District of Virginia, cited as United States v. Gregory, No. 83-0094-D (W.D.Va. April 8, 1988).

- STATEMENT OF JURISDICTION -

The Panel decision was rendered on April 14, 1989. Thereafter the Sheriff filed a Petition for Rehearing pursuant to Federal Rules of Appellate Procedure 40 and a Suggestion for Rehearing En Banc pursuant to Federal Rules of Appellate Procedure 35. The Petition for Rehearing was denied on July 20,

1989.[1] This petition is filed within 90 days thereof. The jurisdiction of this Court is invoked pursuant to §28 U.S.C. 1254(1).

- STATUTE INVOLVED -

The following section of Title VII is involved in this case: 42 U.S.C. §2000e-2(a)(1), which provides in pertinent part:

> It shall be an unlawful employment practice for an employer -- to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individuals . . . sex . . . .

- STATEMENT OF THE CASE -

A. THE DISTRICT COURT OPINION

The United States (hereinafter

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[1]The decision denying the Petition for Rehearing was by a vote of 6-4, with two of the judges voting against the Sheriff in the original Panel decision casting the deciding votes.

"the Government") filed suit against former Sheriff Jesse W. Williams, in June, 1983. It charged the Sheriff with disparate treatment of women in the hiring practices of the Patrick County Sheriff's Department. The trial judge analyzed the case in accordance with Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and found that the Government had not borne its burden of proving discrimination by a preponderance of the evidence.[2]

Concerning the statistical evidence, the court observed that the Government had failed to adduce any evidence

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[2]This decision was not unexpected. In its initial opinion, ruling in favor of the Sheriff on procedural grounds, the district court cited the "paucity" of the Government's proof of discrimination. United States v. Gregory 582 F.Supp. 1319 (W.D.Va. 1984)

pertaining to the labor pool. In addition, the small number of employees in the data base to begin with, coupled with the fact that the work force is largely carried over from one sheriff to the next greatly diminished the statistics' reliability and probative value. Dist. Ct. Opinion Appendix at p. 5-7 (hereinafter "App. at _____").

The district court next addressed the evidence of discrimination as to the individual claimants, beginning with Wanda Hylton. Contrary to the Government's claim that Hylton was denied a promotion by the Sheriff because of her gender, the district court found that other factors motivated his job actions. Hylton was hired as a dispatcher on April 16, 1981, and resigned on November 23, 1981. During her tenure, she never sought transfer to any other

job with the Department nor was she sure she would have taken the job as deputy if one had been offered to her. The district court specifically addressed an alleged admission made to Hylton by the Sheriff which was heavily relied on by the Government and the Panel to support its claim that Hylton was denied a promotion because of her gender. That "admission," in the words of the district court, was the sole "slender thread" on which the Government rested its case as to Hylton. Citing the context in which the statement was made, the length of the interview (30 minutes), the wide range of subjects discussed, the "lighthearted vein" in which the conversation took place and the fact that Hylton did not hear the Sheriff make any similar remark during her seven-month tenure, the district court

concluded that the statement was made in jest. The court further found that "a single statement made with a 'chuckle' was hardly a compelling explanation for Hylton's failure to inquire about other jobs in the Sheriff's Department." Thus, the district court concluded the proximate cause of her failure to be promoted was her own job dissatisfaction rather than any discriminatory animus on the part of the Sheriff. App. at 8-12.

Turning to Doris Scales, the district court found that the Sheriff, for legitimate, nondiscriminatory reasons, considered Scales unsuitable for hire in any capacity with the Sheriff's Department. Significantly, the district court cited uncontradicted evidence of overwhelming community opposition to Scales' appointment and concluded,

"the Sheriff relied on this information and declined to give Ms. Scales the job." App. at 13-14. The district court further cited a personality trait as playing a motivating role in the Sheriff's decision not to hire her. . . overbearing.[3]

The court then considered Sheriff Gregory's job action in failing to reappoint Kathy Sheppard when he replaced Williams as Sheriff on January 1, 1984. Under Virginia law, the tenure of the deputies end with that of their Sheriff. §15.1-48, 1950 Code of Virginia, as amended. Sheriff Gregory testified that he did not reappoint Sheppard because the position she held, civil process

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[3]The court on this matter opined "From my observation of Scales on the witness stand, I cannot say that Sheriff Williams' characterization of her was unjustified." App. at 15-16 (emphasis added).

server, was abolished when he became sheriff to fulfill a campaign promise. Since Sheppard did not testify, nor was any other evidence presented by the Government to contradict the Sheriff, his explanation was accepted by the district court. App. at 17-19.

B. THE PANEL OPINION

The Fourth Circuit reversed the district court, holding that its factual findings up to and including its conclusion that the evidence failed to establish gender discrimination by the Sheriff were "clearly erroneous."

Specifically, the Panel found:

(1) The district court clearly erred because it "did not accord proper weight to the Sheriff's admissions and the testimony of the complainants." 871 F.2d at 1240 (emphasis added).

(2) The district court clearly

erred when it concluded that Sheriff Williams' alleged admission to Hylton was made in jest.

(3) The district court clearly erred in "ignoring" alleged admissions to Scales.

(4) The district court clearly erred in ruling as inadmissible an alleged admission made by the Sheriff's attorney to an EEOC officer.

(5) The district court clearly erred when it refused to consider the statistical data presented by the Government.

- ARGUMENT -

A. THE PANEL DECISION SO FAR DEPARTS FROM THE USUAL AND CUSTOMARY APPLICATION OF THE "CLEARLY ERRONEOUS" STANDARD OF APPELLATE REVIEW AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A determination on the issue of whether a plaintiff has proved

discrimination is a factual finding subject to the clearly erroneous standard of appellate review. Pullman-Standard v. Swint, 456 U.S. 273 (1982). As this Court said in Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985), "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." A review of the Panel decision reveals that it did just that.

The Panel usurped the function of the fact finder by: (1) substituting its own conclusions as to the weight and probative value of the statistics; (2) assigning different "weight" and characterizations to the alleged admissions attributed to the Sheriff; and (3) denying the Sheriff the opportunity to present evidence to rebut alleged admissions made by his attorney.

(1) The district court's evaluation of the statistical evidence offered by the Government has been previously recited. Yet, the Panel insists that the district court "ignored" the statistics. There is simply no basis for that conclusion. To the contrary, the trial judge's careful assessment of the reliability of that evidence is in keeping with the mandates of this Court, Bazemore v. Friday, 478 U.S. 385 (1986), and the Fourth Circuit, EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983). His concern with the "smallness" of the sample is likewise supported by this Court's decision in Mayor of the City of Philadelphia v. Educational Equality League, 415 U.S. 604 (1977). In sum, it is clear that the district court did not "ignore" the statistical evidence,

but rather assessed its probative value in accordance with accepted judicial standards and assigned it weight accordingly.[4]

(2) The Panel found that the district court clearly erred by failing to assign proper "weight" to the admissions of the Sheriff. The Panel holds that these admissions, standing alone, are of such import as to mandate

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[4]The Sheriff recognizes that the question on review is not whether the Court of Appeals findings of fact were clearly erroneous, but whether the findings of the district court were clearly erroneous. Anderson, 470 U.S. at 577. Nevertheless, he complains that the Panel went to extraordinary lengths in magnifying the significance of the statistics and supplying omissions from the Government's offer of proof. It further ignores the findings of a prior panel that "deputies" in the Patrick County Sheriff's Department include all sworn officers including clerk/matrons and the civil process server, U.S. v. Gregory, 818 F.2d 1114, 1115 (4th Cir. 1987), positions routinely occupied by women.

a ruling that the district court's findings in favor of the Sheriff were "clearly erroneous" as a matter of law, notwithstanding the abundance of evidence cited by the district court of legitimate non-discriminatory reasons for the Sheriff's job actions. 871 F.2d at 1243.

The Panel relies first on the "admission" made to Hylton. The district court, for reasons previously cited, found that the remark was made in jest. Not so, says the Panel and, wholly ignoring the circumstances of the conversation, elevates the remark to the status of a "bold admission of discrimination." 871 F.2d at 1242. It clearly overstepped its authority in doing so.

The Panel further relies on admissions allegedly made by the Sheriff

to Scales. Since the district court judge failed to make any factual finding concerning those admissions, said the Panel, he must have "simply ignored" them. This, states the Panel, was error. 871 F.2d at 1242. The Sheriff suggests that although the district court judge does not specifically address the question of whether the Sheriff made the admissions, there is no rule of law that obligates him to do so. Indeed, the overwhelming evidence of legitimate, nondiscriminatory reasons which motivated the Sheriff's job actions concerning Scales, combined with the fact that the Sheriff hired at least four female dispatchers while Scales' application was pending, fairly mandates a finding that the Sheriff did not discriminate against Scales because of her gender. A discussion by the district court of

any alleged admissions would, in light of such evidence, be superfluous.

Significantly, the Panel fails to recognize that overwhelming public opposition to the appointment of a particular individual to the staff of an elected official is, of itself, a legitimate, nondiscriminatory reason for his refusal to hire that individual. The district court found such overwhelming opposition to exist and that the Sheriff relied on it in making his decision not to hire Scales. The Panel, on the other hand, dismisses the Sheriff's reliance on community opposition and refuses to recognize such opposition as a legitimate, non-discriminatory reason for his actions.[5] This holding

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[5] In Price-Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (U.S. May 1, 1989), which was decided after the Panel Decision,

by the Panel illustrates a fundamental misapprehension and misapplication of the standards of proof governing a Title VII action.

The Government offered evidence, which was relied on by the Panel, of an alleged admission made by the Sheriff's attorney to an EEOC officer. 871 F.2d at 1242. The district court ruled this evidence to be inadmissible. The Panel not only held the statement to be admissible under Fed. R. Evid.801(d)(2),[6] but to the chagrin of the Sheriff's attorney, accepted the statement as

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[5](Cont'd) Justice Brennan, writing for the plurality, stated that while Title VII prohibits an employer from considering the gender of an applicant in making its job decisions, it "does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions." 57 U.S.L.W. at 4472.

[6]The Sheriff does not concede that the statement was admissible.

a proven fact without giving him the opportunity to present rebuttal evidence.[7] Such action exceeded the Panel's scope of authority. This is especially true where, as here, the alleged admission plays a key role in its decision. Fundamental fairness dictates that the Sheriff should have been given the opportunity to present rebuttal evidence, and the district court should have been given the opportunity to rule on whether the statement was in fact made.

The role of the appellate court is not to weigh the evidence, for that is the province of the fact finder. Although it is apparent that the Panel would have assigned greater weight to

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[7]The attorney for the Sheriff would testify that he did <u>not</u> make any such statement.

various components of the Government's evidence and decided the case differently, that is not its prerogative. The district court's findings in favor of the Sheriff are supported by competent evidence and are not clearly erroneous.

B. THE EVIDENCE RELIED UPON BY THE PANEL IS INSUFFICIENT AS A MATTER OF LAW TO EITHER SHIFT THE BURDEN OF PRODUCTION TO THE SHERIFF OR TO SUSTAIN THE FINDING OF THE PANEL AS TO LIABILITY.

The foundation for the Panel's holding on the issue of the Sheriff's liability are the alleged admissions. The Panel declares, "if the admissions (of the Sheriff) are credited, a Title VII violation has been proven. Reversal is warranted on that basis alone." 871 F.2d at 1243 (emphasis added). The Panel cites the statistics only to bolster its findings that the Sheriff is guilty of sex discrimination. The

Panel's conclusion is indefensible in light of this Court's decision in Price-Waterhouse.

Although Price-Waterhouse was a "mixed motive" case and the case at bar is a "pretext" case, the Price-Waterhouse analysis is relevant to the issue of the sufficiency of the evidence to sustain the Panel decision for if the evidence is insufficient under Price-Waterhouse, it is certainly insufficient under the Burdine and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) standard.

In Price-Waterhouse, this Court left open the question as to what specific facts, standing alone, would or would not establish a plaintiff's case. 57 U.S.L.W. 4476. The plurality, however, left no doubt as to what facts would be insufficient to establish a plaintiff's

case:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision.
>
> 57 U.S.L.W. at 4476. (Emphasis added)

This language suggests that sexist remarks, standing alone, are wholly insufficient to shift the burden of production to the defendant. It unquestionably precludes a finding that such evidence is conclusive on the issue of liability. This would be especially true where, as here, the district court specifically found evidence to support legitimate, nondiscriminatory reasons for the Sheriff's job actions.

Assuming, arguendo, that the admissions and statistics are sufficient to suggest that gender played a role

in the Sheriff's hiring practices, they are of insufficient quality or quantity to justify the Panel in discarding as clearly erroneous the findings of the district court as to the existence of legitimate, non-discriminatory reasons his job actions. Of the four alleged admissions, one was found by the district court to have made in jest, one was denied by the Sheriff and found insignificant by the district court; one was ruled inadmissible by the district court and may not, technically, be treated as substantive evidence. The admission by Sheriff Williams that he did not consider women for positions as correctional officers was based in good faith on advice of counsel[8] was not

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[8] In its second opinion on remand, the district court sustained the Sheriff's claim that sex was a BFOQ for the position of correctional officer.

shown to affect any female applicant (See, e.g., App. at 20) and has been expressly disavowed by his successor, Sheriff Gregory. The statistics, intended to "bolster" the admissions, were found to be unreliable.

The Panel concluded that the Sheriff's stated reasons for his job actions were "shown to be pretextual." 871 F.2d at 1247. To accept that conclusion would be to engraft to Title VII an irrebuttable presumption of discrimination predicated on the meager facts stated by the Panel. The Sheriff submits that such facts are insufficient under Burdine-McDonnell Douglas, insufficient under Price-Waterhouse, and insufficient under any other generally accepted judicial standard to sustain that conclusion.

- CONCLUSION -

For the foregoing reasons, the Sheriff contends that he has been unjustly tarred with the stigma of sex discrimination. This resulted because the Panel sharply deviated from the accepted course of judicial proceedings in discarding the findings of the district court as clearly erroneous and because it misapprehended and misapplied fundamental rules governing standards of proof in a Title VII case. It usurped the role of the fact finder by, in effect, retrying the case on the merits. Accordingly, the Sheriff prays that his Petition for Certiorari be granted.

Respectfully Submitted,

JAY E. GREGORY, et al, Petitioners

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Appendix "A"

Opinion Rendered: April 8, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	Civil Action
v.	)	#83-0094-D
	)	
JAY GREGORY, SHERIFF OF PATRICK COUNTY,	)	MEMORANDUM
	)	OPINION
	)	
Defendant	)	

By: Jackson L. Kiser, Judge
United States District Court

This case is again before this Court on remand from the Fourth Circuit. The procedural and historical background of this case are found in two opinions of this Court and in two opinions of the Fourth Circuit. Those opinions are, in chronological order, the opinion of this Court filed March 23, 1984;[1] the unpublished opinion of the Fourth Circuit decided October 1, 1975 (slip.

op. No. 84-1613); the opinion of this Court filed July 18, 1986; and the opinion of the Fourth Circuit decided May 19, 1987.[2]

After receiving the mandate of the Fourth Circuit on its second remand, I held a conference with counsel to define the issues which needed to be resolved. It was determined that the following issues should be briefed and argued by counsel and resolved by the Court:

1. Whether the Defendant (Sheriff) denied employment to Doris Scales, Wanda Hylton, and Kathy Sheppard because they were women;

2. Whether the Plaintiff (Government) is entitled to injunctive relief and, if so, in what form; and

3. Whether the Virginia State Compensation Board is a necessary party

defendant.

In addition to the above issues, the Government has raised a subsidiary issue of whether the Court should reopen the record to receive additional evidence for the purpose of fixing damages and fashioning appropriate injunctive relief.

Counsel have fully briefed their respective positions, and on February 5, 1988, I heard oral argument. After oral argument, the Court was advised that the Defendant was abandoning his position that the Virginia State Compensation Board is a necessary party to the proceeding. I had previously ruled on that issue in my July 18, 1986, opinion at p. 11, stating that the Virginia State Compensation Board was not a necessary party to the suit. That ruling will stand.

In my March 23, 1984, Memorandum

Opinion, I strongly implied that the United States' proof of discrimination was insufficient. Gregory, 582 F. Supp. at 1320. Unfortunately, instead of proceeding to resolve the case on the sufficiency of evidence, vel non, I chose to interpret certain provisions of Title VII which I felt were dispositive of the case. But as it has turned out, my interpretation of the statutory provisions was in error. So now I must address the sufficiency of evidence question. In so doing, I make explicit that which was implicit in my earlier opinion--that the Government's evidence fails to prove that but for the gender of Doris Scales, Wanda Hylton, and Kathy Sheppard, the Sheriff would have employed them.

Before turning to the circumstances surrounding the Sheriff's failure to

employ each of these women, I will address the Government's argument that the statistical information presented by it shows a pervasive antifemale bias of the Sheriff. In its argument the Government asserts, "From January 1, 1980 through January 20, 1984, the Sheriff of Patrick County filled a total of sixty-three (63) full-time vacancies in PCSD . . . all of which were filled by men." Post Trial Brief of Plaintiff at 16. To support this statement, it sets forth a manning chart which shows the date of employment for all employees listed thereon.

The statistics are meaningless. The record is silent as to any female applicants for jobs with the Sheriff's Department other than the four women who have been discussed so we do not know what sort of a labor pool the

Defendant had to choose from. The Government implies that because Title VII had been applicable to public employees since 1972 that there was some duty on the Defendant to establish an affirmative action program to recruit or prefer women. But such an argument is untenable in light of the Supreme Court's decision in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and the Fourth Circuit's decision in Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979). Moreover, the statistics are flawed on their face. It is clear that at least 11 of the 22 appointments open to Sheriff Williams were reappointments of employees he inherited from his predecessor. The same holds true as to Sheriff Gregory. The manning chart shows that his January 1, 1984,

appointments, except for two deputies, were inherited from Sheriff Williams' administration.[3] Given the small number of employees in the data base to begin with, the fact that the work force is in great part continued from one four-year term to the next, thereby reducing the Sheriff's opportunity to hire new employees, further diminishes the reliability of the Government's statistics.

In addition to the statistics, the Government has undertaken to prove its case by anecdotal evidence that the three females, Scales, Hylton, and Sheppard, were treated less favorably when being considered for a job than were the males who were hired to fill the job. The Defendant in each instance has articulated nondiscriminatory reasons for his job actions. Thus, it becomes

the Plaintiff's burden to prove that the reasons assigned by the Defendant were pretextual and that the real motive for his actions was gender discrimination. See U.S. Postal Service Bd. of Gov. v. Aikens, 460 U.S. 711 (1983). As in all civil cases, it is the Plaintiff's burden to prove its case by a preponderance of the evidence, that is, that what it seeks to prove is more probably so than not so. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982). Thus, the Plaintiff must prove that in each instance that, but for the gender of Scales, Hylton, and Sheppard, she would have been hired for the position she sought. It is in this frame that the evidence of the case must be examined.

Wanda Hylton: On March 25, 1981, Wanda Hylton applied for a job with

the Patrick County Sheriff's Department. On April 16, 1981, Sheriff Williams hired her as a dispatcher. On November 23, 1981, Hylton resigned her job as dispatcher. Hylton never applied for any other job with the Patrick County Sheriff's Department. (Tr. 144-145). Nor was she sure she would have taken the job of deputy if it had been offered to her. (Tr. 145-146). Hylton testified that the reason she did not apply for a job as a deputy sheriff was that on the date of her application during the course of an interview with Sheriff Williams, she asked him whether he would consider hiring a woman as a deputy. According to her, the Sheriff responded "by chuckling and saying that he would not hire a woman in his department as a deputy, that he did not think women could handle the job, that they could

not handle men." (Tr. 139). On this slender thread, the Government charges that the Defendant discriminated against Ms. Hylton.

The context of the statement is important. It was made during a thirty-minute interview at the time of Hylton's application. The pertinent colloquy is a follows:

> Q. How long did you talk to him?
>
> A. About thirty minutes.
>
> Q. What -- What did you discuss?
>
> A. We started out discussing simply our schools. I think we discussed football and basketball. We went from there talking about my degree, the classes that I had taken, my ambitions. At one point I did ask the sheriff if he hired women deputies, and he chuckled and said, no, that he didn't hire women deputies; he didn't think they could handle the job; they couldn't handle the men.
>
> Went on to discuss the fact that if I were seriously interested in law enforcement, it would probably be best if I applied with the state police.

It is obvious that the interview covered a wide range of topics, and was in a lighthearted vein. Even the statement on which the Government relies bears this out -- "by chuckling and saying . . ." Hylton worked for Sheriff Williams over seven months, and it seems that if he were unhesitating in expressing an anti-female bias to her on one occasion, she would have heard him say something else to the same effect during that length of time. The fact that she did not greatly undermines the content of the statement. The most probable conclusion is that the statement was made in jest. Certainly, a single statement made with a "chuckle" is hardly a compelling explanation for Hylton's failure to inquire about the availability of other jobs in the Sheriff's Department. The more believable explanation is that

she was looking for a job elsewhere that was more suited to her training and education -- just as Sheriff Williams surmised. (Tr. 238-39).

In any event, the Hylton matter is considered only for the purpose of determining whether Sheriff Williams had a bias against women in general for it is clear from Hylton's testimony that she wants neither back wages nor a job with the Sheriff's Department. (Tr. 149).

Doris Scales: Although stated in the context of deciding the personal staff exemption in the Court's opinion of March 23, 1984, the crucial facts surrounding the Sheriff's decision not to hire Doris Scales were resolved in favor of the Sheriff. In that Opinion, I pointed out, ". . . being an elected official, the Sheriff must depend upon

his deputies to be his eyes and ears as to public sentiment and opinion. Unofficially, it is the deputy's job to know what is going on in his assigned area of the county that might affect the Sheriff favorably or adversely in the eyes of the voting public." Gregory, 582 F. Supp. at 1321. The 1984 Opinion then continues to review Deputy Clifford Boyd's testimony, pointing out that he was the deputy who was assigned to the area of Patrick County in which Doris Scales lived, and that there was a lot of opposition in that area to the appointment of Scales to a position in the Sheriff's Office. See id [sic]. I then found "the Sheriff relied on this information and declined to give Ms. Scales the job." Id. See also Tr. pp. 223, 231. The Opinion notes further that "the Government raises

an issue about the fact that Ms. Scales was unjustly accused of having a bad moral and credit reputation and asserts there were male deputies with moral or credit records which are just as bad or worse. But this totally misses the point. As an elected official, the Sheriff was concerned with the public's perception--right or wrong--of Ms. Scales." Gregory, 582 F. Supp. at 1321, n.5.

The Government's current position is that Deputy Boyd was so severely impeached by his discovery deposition and during his cross-examination at trial that his testimony is not credible. Specifically, the Government points to the fact that although Boyd testified that Scales reputation was bad in the community, he was unable to recall specifically any persons who had expressed

such a view to him. I can no more accept the Government's argument now than I could the first time around. As pointed out above, Deputy Boyd had been placed in a position of trust by the Sheriff, and the Sheriff relied upon him to take and report the pulse of the community. So the question is not whether the underlying information upon which Boyd made his report was accurate, but whether the Sheriff reasonably relied upon the information that Boyd conveyed to him. I find that he did.

Sheriff Williams was adamant in his view that he would not hire Scales for any position. This was not only because of the information he received from Deputy Boyd, but also because of a personality trait -- overbearing. In the words of Sheriff Williams, "The impression I got from Mrs. Scales was

she was not seeking a job, she was demanding a job." (Tr. 229). From my observation of Scales on the witness stand, I cannot say Sheriff Williams' characterization of her was unjustified.

In addition to the above reasons for not hiring Scales, the Sheriff advanced several other reasons which I consider to be more makeweight than real reasons. For example, her perfume was too strong. These makeweight reasons, however, do not detract from the Sheriff's primary assertion that the reason he failed to hire Scales was because of her bad moral and credit reputation in the area of Patrick County in which she lived. The Government had the burden of proving that sex discrimination was more probable than the reason assigned by the Sheriff, Lovelace v. Sherwin-Williams, supra, and this it

has failed to do.

Kathy Sheppard: During the tenure of Sheriff Williams, Kathy Sheppard was employed as a deputy sheriff with the job assignment of process server. When Sheriff Gregory took office on January 1, 1984, he abolished the position of process server. I have previously found that Sheriff Gregory's explanation that he abolished the position of process server because of budgetary constraints to be a valid nonpretextual reason for his action in dismissing Kathy Sheppard. See Memorandum Opinion, July 18, 1986, at 13, n.1. The Government seems to accept the fact that Sheriff Gregory's action in abolishing the position of process server was not itself a sex-based decision, but argues that the Sheriff should have considered her for some other position in the department.

Specifically, the Government urges that because of her seniority, Sheriff Gregory should have considered permitting her to "bump" one of the four male correctional officers. When Sheriff Gregory was asked about this possibility, he responded in part, "I didn't feel that I could knock someone else out of a job, where I felt like they had been doing an adequate job, and that's why I didn't do it." United States' Memorandum for Entry of Judgment at 20 (filed January 11, 1988).

Had Sheriff Gregory chosen to "bump" one of the corrections officers in favor of Sheppard, he probably would have been legally justified in doing so. However, he was not legally required to do so. See Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979). In Wright the plaintiff,

a black, was competing with a white employee for a desired job assignment. The plaintiff argued that he should have been given preference because of his race. To that argument, the Fourth Circuit responded:

> Thus, it is apparently suggested that with the ability to assign only one trainee to the Special Projects Staff, defendants' only permissible, i.e., nonpretextual, basis for decision was deliberately to favor a black trainee over the sole white trainee without regard to any other considerations. However that may commend itself as a basis for action on principles other than the legal one we enforce, and however legally defensible it might be if done voluntarily, it clearly is not commanded by Title VII.

Wright, 609 F.2d at 717 (citations omitted).

The court then went on to cite, with approval, the following language from Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978):

> Title VII prohibits . . . having as a goal to work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.

Furnco, 438 U.S. at 577-78.

It is true that Sheriff Gregory was not justified in his reasoning that being male was a bona fide job qualification; however, because he assumed the legally valid posture that he would not terminate any of his male corrections officers to make room for Sheppard, the Sheriff has shown that Sheppard would not have been assigned as a corrections officer even if the Sheriff had not been mistaken in his belief that the job required a male to fill it.[4] See Mt. Healthy School Board v. Doyle, 429 U.S. 274 (1977).

The Government advances the same

"bumping" argument as to the jobs of dispatcher (this job was filled by both men and women), road deputy, and courtroom security officer, but the Government's argument with respect to these job classifications must fail for the same reason its argument as to corrections officer fails. The Sheriff was not required to fire another employee to make room for Sheppard.

In sum, I find that the Government has failed to carry its burden of proof that but for the Defendant's invidious discrimination Hylton, Scales, and Sheppard would have been hired (or transferred in the case of Sheppard) into a position in the Sheriff's Department. These findings moot the remaining issues of what relief the Court should grant.

An appropriate Order will be entered.

The Clerk is directed to send a certified copy of this Memorandum Opinion to all counsel of record.

/s/ Jackson L. Kiser
United States District Judge

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[1]U.S. v. Gregory, 582 F. Supp. 1319 (W.D. Va. 1984).

[2]U.S. v. Gregory, 818 F.2d 1114 (4th Cir. 1987).

[3]Under Virginia law, the term of a deputy sheriff expires with the term of the sheriff and to continue in office the deputy must be reappointed. See U.S. v. Gregory, 582 F. Supp. at 1320. During his 4 year tenure, Sheriff Williams made only 18 new appointments to the office of deputy sheriff (7 road deputies, 10 correctional officers and 1 courtroom security officer). Sheriff Gregory retained 20 of the 22 people that he inherited from Sheriff Williams and he eliminated one position.

[4]Even though the Defendant foreclosed this position to women, it is not decisive of the claims of Scales and Hylton either. As has been discussed, Sheriff Williams would not have hired Scales for any position under any circumstances. Hylton testified she did not know whether she would have accepted such a job or not, and even if she would have at the time she left the Sheriff's Office, she now says she does not want a job with the Sheriff's Department and does not want back wages even if she would have been entitled to them.

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 88-2839

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAY GREGORY, Sheriff of Patrick County, a Constitutional Officer of the Commonwealth of Virginia and elected under the laws of the Commonwealth,

Defendant-Appellee,

and

JESSE WILLIAMS, Sheriff of Patrick County,

Defendant.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, District Judge. (CA-83-94-D).

Argued: December 6, 1988
Decided: April 14, 1989

Before HALL and MURNAGHAN, Circuit Judges, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Irving Gornstein (William Bradford Reynolds, Assistant Attorney General, Jessica Dunsay Silver, UNITED STATES DEPARTMENT OF JUSTICE, on brief) for Appellant. Anthony Paul Giorno, County Attorney, for Appellee.

MURNAGHAN, Circuit Judge:

In June 1983, the United States filed suit against Jesse W. Williams, the Sheriff of Patrick County, Virginia, complaining that he had followed and continues to follow a practice of refusing to consider women for deputy sheriff positions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.[1] The Government sought prospective relief to prevent further discrimination through the active recruitment of women to deputy sheriff

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[1]The case was properly referred to the Department of Justice by the Equal Employment Opportunity Commission (EEOC). A charge of discrimination was filed with the EEOC by Doris Scales on July 30, 1980, alleging that Sheriff Williams unlawfully refused to hire her in May, 1980 as a deputy on the basis of her gender. This case also involves similar allegations by Wanda Hylton, Kathy Sheppard and Stephanie Ressel. For a more detailed recitation of the fact, see our earlier opinion at 818 F.2d 1114 (4th Cir. 1987).

positions. It also sought back pay and jobs for those denied employment on the basis of their sex.

In November 1983, Sheriff Williams suffered defeat in a reelection bid and was replaced by Jay Gregory, who was then substituted as the defendant.

After a full trial without a jury, the Honorable Jackson L. Kiser dismissed the complaint, ruling that deputy sheriff positions in Patrick County are not covered under Title VII because they fall within the "personal staff" exemption.[2] United States V. Gregory, 582 F. Supp. 1319 (W.D. Va. 1984). We vacated the decision and remanded in light of Curl v. Reavis, 740 F.2d

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[2] See 42 U.S.C. § 2000e(f).

1323 (4th Cir. 1984).[3] On remand, Judge Kiser held that the positions of road deputy, investigator and shift supervisor fell within the "personal staff" exemption, as he had originally concluded. He also held that with respect to the fourth deputy position, that of a corrections officer, maleness was a BFOQ.[4]

On appeal, the Fourth Circuit once again reversed, holding that the "personal exemption" did not apply and that the defendant had failed to prove that a female corrections officer could not be accommodated by reasonably rearranging

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[3] United States v. Gregory, 84-1613 (4th Cir. Oct. 1, 1985).

[4] Memorandum and Order entered July 18, 1986. Judge Kiser did find that Sheriff Williams had discriminated against Stephanie Ressel in filling the courtroom security position.

job responsibilities within the jail. United States v. Gregory, 818 F.2d 1114 (4th Cir.), cert. denied, 108 S. Ct. 143 (1987). We remanded the case to the district court for consideration of the merits.

Upon remand, Judge Kiser evaluated the sufficiency of the evidence presented by the Government and held that the Government had failed to carry its burden of showing that the Sheriff exercised a discriminatory practice of refusing to hire women who but for their gender would have been hired in deputy positions. More specifically, Judge Kiser discredited the statistical evidence presented by the Government and characterized the women witnesses' testimony as merely anecdotal and insufficient. Although Judge Kiser appeared to credit the Sheriff

with making certain admissions regarding his practice of never hiring a woman for deputy positions, Judge Kiser characterized the Sheriff's statement on one occasion as a joke and ignored its significance at other times. Because the district court applied an incorrect legal standard in assessing the statistical evidence presented by the Government and because it did not accord proper weight to the Sheriff's admissions and the testimony of the complainants, reversal is warranted.

The case presents three issues:

A. Whether the district court erred in refusing to consider the admissions which the Sheriff made concerning his policy of refusing to hire women for deputy positions in violation of Title VII.

B. Whether the district court erred in refusing to consider the Government's statistical evidence offered to support its burden of showing that the Sheriff had a

practice or policy of refusing to consider and hire women for deputy positions in violation of Title VII.

C. Whether the government would be entitled to prospective relief to prevent further discrimination and make-whole relief for Doris Scales and Kathy Sheppard.

I.

The Government's theory of discrimination was simply that the Sheriff, in violation of Title VII,[5] regularly and purposely treated women less favorably than men when making hiring decisions for deputy vacancies.

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[5]Title VII provides, in pertinent part:

(a) It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2(a).

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The alleged disparate treatment resulted from the Sheriff's acceptance of the proposition that women were incapable of performing the duties of deputies.[6] The Government further alleges that the Sheriff refused seriously to consider any female applicants for deputy positions, and that the applicants were

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[6]The Government had to show by a preponderance of the evidence that sex discrimination was the Sheriff's standard operating procedure--the regular rather than the usual practice. Teamsters, 431 U.S. at 336. Once the pattern or practice has been proved, an inference is raised that all employment decisions, during the period in which the discriminatory practice has been in force, were made in pursuit of the policy. The burden shifts to the employer to provide a lawful reason for denying employment to the class member. Id. at 362. If the employer provides a lawful reason, the burden shifts back to the Government to show that the reason was pretextual.

otherwise superbly qualified and scored significantly higher on the written examination than the male applicants who were ultimately hired.[7]

It is usually a rare case where the district court, under the clearly erroneous standard of review, is reversed. See Beatty v. Chesapeake Center, Inc., 835 F.2d 71 (4th Cir. 1987) (en banc). That is so because the district court's factual findings must be affirmed if there is evidence to support them and cannot be reversed unless the reviewing court is left with a definite and firm conviction that a mistake has been committed. Anderson v. Bessemer City,

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[7]At the "liability" stage, the Government is not required to show that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Teamsters, 431 U.S. at 360.

470 U.S. 564 (1985). After a review of the entire evidence, we are convinced that such mistakes were made here.

As plaintiff with the burden of proving a prima facie case of discrimination, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), the Government offered three types of evidence: (1) the Sheriff's admissions that he had a policy not to hire women for deputy positions; (2) statistical evidence; and (3) the testimony of the complainants. We separately consider the issues raised on appeal.

II.

A. The Sheriff's Admissions

The Government presented testimony indicating that at least on four separate occasions the Sheriff had admitted that he had a policy of discriminating against

women when considering them for deputy positions. First, Wanda Hylton, though Sheriff Williams denied ever making the statement, asked Sheriff Williams if he would consider hiring a woman as a deputy. According to her testimony, the Sheriff "chuckled and said, no, that he didn't hire women deputies; he didn't think they could handle the job; they couldn't handle the men."

Hylton did not actually apply for a deputy position, but was hired as a dispatcher. The district court thought it was particularly noteworthy that she did not hear Sheriff Williams make any other negative statement about women during her 7-month tenure at the Sheriff's Department and that she failed to apply for any other position while there. However, Hylton did testify, and Sheriff

Williams confirmed, that the two of them did not get along. She also testified that after her initial discussion with Sheriff Williams, she considered it futile to apply for a deputy position. The Supreme Court has recognized that when an employer's discriminatory policy is known, subjecting oneself to the humiliation of explicit and certain rejection is not required to make out a case of discrimination. Teamsters, 431 U.S. 324, 365 (1977).[8]

The district court further discounted Hylton's testimony by characterizing Sheriff Williams' statement as joke.

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[8] "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." Id. at 365-66.

Here the district judge clearly erred. There was no evidence to support such a finding. The characterization established that the statement had been made. Sheriff Williams did not testify that he was joking when the statement was made; he only denied making the statement. The district court deduced its finding from the testimony of Hylton, who said that the Sheriff chuckled when he admitted to his policy of not hiring female deputies. Yet, contradictorily, it was assumed that Sheriff Williams was being "serious" when he next told Hylton that if she were truly interested in law enforcement, she should apply with the state police. The real point is that the district court erratically refused to recognize the Sheriff's bold admission of discrimination because

the Sheriff was good-humored when he made it.

The second admission was made to Doris Scales at several different times during her application, interview and follow-up discussions with Sheriff Williams. Scales testified that Sheriff Williams stated that he did not "have any plans now, or in the near future, to hire any women for deputies' because he did not "feel like they're capable of handling the job as a deputy." In effect, the district court simply ignored testimony to that effect, because it failed to make any finding concerning these admissions. In that it was in error.

The third admission was made by Sheriff Williams while he testified. He admitted on the stand to having a

policy of refusing to hire women as corrections officers. He claimed that his policy was justified because of his concern for the inmates' privacy. However, the evidence also showed that the jail used video cameras to supervise and observe the inmates in their cells and that the cameras were viewed by the dispatchers, many of whom were women. Furthermore, we had a prior opinion in this oft recurring case found that Sheriff Williams' concern about inmate privacy was not a justification for his discriminatory policy against women with respect to the corrections officer position. United States v. Gregory, 818 F.2d at 1117-18.

Finally, Mr. Giono [sic], the county attorney who represented Sheriff Williams, made a relevant statement to Amelia

Badillo Montez, an equal employment opportunity specialist who was investigating Scales' complaints against the Sheriff. Montez testified from her notes regarding a telephone conversation she had with Giono [sic]. She stated that "Mr. Giono [sic] repeated that the sheriff wants big, tall men for that job [patrolman], that could defend themselves and be somewhat imposing." She added that Giono [sic] said, "Females don't have a chance in this position." The district court held that Montez's testimony and her notes were inadmissible hearsay as a conversation between her and the attorney. Judge Kiser expressed the view that Giono [sic] was not speaking for the county and that he was representing only Sheriff Williams.

The Government argues that the statement falls within a hearsay exception and should have been admissible as an authorized statement or as an agent's statement under Fed. R. Evid. 801(d)(2).[9] The Sheriff, not surprisingly, urges that the law is to the contrary. No party has advanced any argument beyond the rule itself. Although there is relatively little authority on the subject of admissibility of an attorney's extrajudicial statements on a client's behalf, see McCormick on Evidence §267,

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[9]Rule 801(d)(2) states in pertinent part:

A statement is not hearsay if

The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

at 791 n.21 (1984), we have addressed the issue in United States v. Martin, 773 F.2d 579 (4th Cir. 1985). That case involved a prosecution for tax evasion. The defendant's attorney had told the IRS auditor that the defendant had made additional unreported income by selling chickens. The statement was made pretrial during the course of the lawyer's representation of the defendant.[10] Because the statement did not rise to a level of criminal liability,[11] the attorney had not exceeded

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[10]The attorney acted pursuant to a power of attorney filed with the IRS. However, this Court found that despite the limited nature of the power of attorney, the attorney still dealt with the IRS auditors as Martin's representative.

[11]The attorney had qualified the statement by asserting that the defendant did not know that the additional income was reportable.

the scope of his authority. The statement was, therefore, admissible. Id. at 583. It is not suggested that the statement exposed Sheriff Williams (or Giono [sic]) to criminal liability.

In this case, the district court recognized that Giono [sic] was representing the Sheriff. The admission was made in the context of the discrimination claim as to which Sheriff Williams required Giono's [sic] services. The admission should have been admitted in evidence and the failure to do so was error.

As the Government has pointed out, if the admissions are credited, the Title VII violation has been proven. Reversal is warranted on that basis alone. In addition, the Government also has bolstered its case with

statistical evidence.

B. The Statistical Evidence

The Supreme Court has recognized the importance of statistical evidence in proving Title VII violations. Teamsters, 431 U.S. at 341 & n.20.[12] The Government presented the following statistical evidence. The Sheriff's Department of Patrick County has never employed a woman as a deputy. During the four years that Sheriff Williams served, he hired only men to fill the 30 vacant deputy positions which arose. Of these, 19 were new hires and the

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[12]Most "pattern and practice" cases are proved through the use of statistics. Teamsters, 431 U.S. at 339. This is most likely true today because the typical employer, sensitized to Title VII penalties, will not adopt a blatantly intentional policy of discrimination, such as in this case where the Sheriff admitted to have such a policy.

remaining 11 were carryovers from the previous administration. Similarly, Sheriff Gregory, Sheriff Williams' successor, during his brief tenure prior to the trial, hired 16 deputies, all of whom were men. Statistically, 14 were carryovers and two were new hires.[13]

The district court concluded that the statistical evidence was "meaningless" because it did not include applicant flow data and because the Sheriff carried

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[13]The district court found that Sheriff Williams made 22 appointments, again, however, 11 of which were reappointments of employees he "inherited from his predecessor." In a footnote, the district court stated that Sheriff Williams made 18 new appointments to the office of deputy sheriff and Sheriff Gregory retained 20 of the 22 carryovers from his predecessor and eliminated one position. We note that these unexplained differences in the number of appointments is not significant to our finding that the statistical evidence should not have been ignored by the district court.

over incumbent deputies, which greatly reduced the Sheriff's opportunity to hire new deputies. There are at least two flaws in such reasoning: (1) applicant flow data is not required to prove discrimination through statistics and (2) deputy incumbency and short tenures may not obscure or excuse the fact that Sheriff Williams had the opportunity to hire women in noncarryover deputy positions at 19 separate times (as conceded at oral argument) and he never did.

First, the Government correctly points out that applicant flow data is not required to prove discrimination through statistics. In the first Title VII case in which the Supreme Court approved the use of statistics to prove a prima facie case of discrimination,

the Supreme Court expressly recognized the probative value of statistical evidence that compares the proportion of minorities in the relevant work force to their proportion in the general population, without regard to applicant flow. Teamsters, 431 U.S. at 339 & n.20. In fact, as the Supreme Court noted, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic [and in this case, gender] composition of the population of the community from which employees are hired." Id. at 340 n.20. In rejecting petitioner's argument that such a comparison should never be given decisive weight, the Supreme Court stated:

"Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant . . . ." Id.[14]

Building on the approval of statistical data in Teamsters, the Supreme Court had another occasion to discuss applicant flow data in Hazelwood School District v. United States, 433 U.S. 299 (1977). In Hazelwood, the Court recognized that when special skills were required for a particular job,

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[14]The Supreme Court also acknowledged the reality that others can be injured by discriminatory policies besides those who actually requested employment opportunities. Teamsters, 431 U.S. at 365. Thus, applicant data may not always be available, and should not render statistics "meaningless" because the policy itself may have deterred job applications from those who understood that their attempts would be futile.

statistics comparing the percentage of minorities in the general population were not as probative.[15] Id. at 308 n.13. Similarly, the Court noted that applicant flow data would be relevant and should be considered by the district court on remand[16] if it could be adduced.[17] Id. The Supreme Court clearly

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[15]The relevant labor pool for comparison would be the percentage of minorities possessing the special skills or experience required to perform the duties of the job. The Supreme Court did not completely rule out the use of general population comparisons in special qualification cases. See Equal Employment Opportunity Commission v. Radiator Specialty Co., 610 F.2d 178, 184 n.7 (4th Cir. 1979).

[16]The case was remanded because of several errors on the part of the district court, including its finding that the statistical evidence was nonprobative because it did not compare the proportion of black school teachers to the proportion of black school students.

[17]The Supreme Court noted earlier that the parties disagreed whether the race of the applicants could be obtained from the record.

did not require that such information be obtained for the statistical evidence to be significant and outrightly rejected petitioner's argument that it was required.

In the case at bar, the relevant labor pool did not require any special skills to qualify as applicants for the position of deputy.[18] Furthermore, this Court has held that in those situations where it cannot be said as a matter of law that either special

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[18]Under Virginia law, an applicant for deputy sheriff must be a United States citizen, have a high school diploma or the equivalent, have a valid driver's license, complete a physical examination and undergo a background investigation. Va. Code § 15.1-131.8 (Cum. Supp. 1988). Sheriff Williams also required applicants to fill out a written application, at least most of the time, and to pass a written test.

However, those requirements were not always adhered to. For example, several deputies had never taken the written test.

skills are or are not required, the burden rests on the "defendant to establish that the positions in fact do require special qualifications not possessed or readily acquired by the general population, at peril of having the general population statistics presumed appropriate in assessing plaintiff's prima facie proof." Equal Employment Opportunity Commission v. Radiator Specialty Co., 610 F.2d 178, 185 (4th Cir. 1979).[19] Although the Government

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[19] If the defendant succeeds in meeting that requirement (Sheriff Williams did not), the plaintiff should have an opportunity to adjust its statistical proof to reflect a labor pool base with the special qualifications. Id. We further elaborated on the equity of that allocation of proof, indicating that the defendant was the party with the most ready access to the relevant information. If it were otherwise, the plaintiff would all too late in the game discover that it could not rely on general population statistics. Id. n.8.

apparently did not supply census data demonstrating the percentage of women in the labor pool in Patrick County, we take judicial notice of the fact that no less than 50% of the relevant labor pool is comprised of women.[20] The district court was clearly in error when it refused to consider the statistical data presented by the Government.

Once the Government shouldered its burden of proving a prima facie case of discrimination, the burden shifted

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[20]The Supreme Court does not require fine tuning of statistics when the inference of discrimination arises from "'the inexorable zero.'" Teamsters, 431 U.S. at 342 n.23. In other words, the focus in this case may properly be upon the fact that the Sheriff's Office has never hired a woman as a deputy.

to the Sheriff to rebut the proof.[21] The Sheriff clearly has offered no evidence, other than fallacious criticisms of the statistical evidence. Again, the Supreme Court has recognized that such failure on the part of the defendant to rebut the inference of discrimination comes not from a misuse of statistics, "but from 'the inexorable zero.'" Teamsters, 431 U.S. at 342 n.23.

Second, deputy incumbency and short tenures cannot excuse the fact that the opportunity to hire women existed on 19 specific occasions,[22] but no women

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[21]The Sheriff could have done this by offering his own statistics, including applicant flow data, to demonstrate that he did not have women applying for deputy positions in statistically significant numbers.

[22]Given that the labor pool is likely to consist of 50% women, the probablilty that a woman would not have been hired to fill one of the vacancies is 1 over

were hired. Sheriff Williams, in fact, had at least three opportunities to hire a woman, but chose instead to hire less qualified male applicants.[23]

The district court's reliance on the fact that many of the positions were filled with "carryover" deputies from the previous administration, thus reducing the opportunity to hire women, appears also to be flawed. The district court and the Sheriff point out that the deputies serve at the will of the

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[22](Cont'd)2 to the 19th power or 1/262,144. Given the population of Patrick County of 17,000 people, the probability is overwhelming that at least one woman at some time during Sheriff Williams' tenure should have been hired if he did not have a discriminatory policy which excluded applicants on the basis of gender.

[23]For example, Hylton had a college degree, a background in law enforcement and performed exceptionally well on the written test.

Sheriff who appointed them. Va. Code §15.1-4B (Repl. Vol. 1978 & Supp. 1983). A deputy sheriff has no expectation of appointment or reappointment outside the personal relationship he has with the Sheriff. Whited v. Fields, 581 F. Supp. 1444, 1453 (W.D. Va. 1984). Therefore, all of the positions, both new and carryovers, are legally open positions for which Sheriff Williams, and later Sheriff Gregory, refused seriously to consider women.[24] Invoking

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[24]The district court also noted that the "small number of employees in the data base to begin with . . . further diminishes the reliability of the Government's statistics." The Supreme Court considered the importance of a small sample size in Teamsters and concluded that it may detract from the value of the statistical evidence. Teamsters, 431 U.S. at 340 n.20. However, in this case, the small number of Sheriff's employees making up the data base cannot be seen as establishing statistical insignificance because it comprises the entire universe of available

a courtesy or carryover rule when the result is inexorably gender discrimination is inevitably an end run around the statute and its preeminent purpose.

Again, the district court was clearly in error when it refused to consider the Government's statistical data. The pattern or practice of discriminating against women stands so clearly revealed on the basis of the Sheriff's admissions and the statistical evidence that we do not need to rely, to establish the existence of pattern or practice, on the testimony of the three complainants to resolve the liability question.[25]

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[24](Cont'd)positions and does not merely constitute an unrepresentative sample.

[25]In order to be awarded make-whole relief, however, the complainants must show that they were victims of the Sheriff's policy.

We mention their testimony briefly, however, because of its relevance to the remedy issue in this case on remand.[26]

C. The Proper Remedy

Finding no liability, the district court did not discuss a remedy. Although

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[26]We have ascertained the presence of clear error in the district court's weighing of the testimony of the complainants. These three women testified at trial concerning their experiences with the Sheriff when applying for a deputy position, an attempt which was uniformly unsuccessful.

As indicated earlier, a fourth woman, Ressel, was awarded back pay for the discrimination she experienced when she applied for the position of corrections officer. The district court apparently viewed her case as an isolated incident, since it found that the other three women had not been victims of discrimination. However, as we discuss below, the evidence compels a finding that all four women were discriminated against by the Sheriff's practice of not seriously considering any women for deputy positions. Therefore, Ressel's testimony is relevant to support a finding that there was a practice to discriminate and that the Sheriff's admissions of such a practice were clearly not a joke.

the question of a proper remedy should first be addressed by the district court, we regard it appropriate to provide some general guidance on the question, especially in light of the protracted nature of the case and the arguments advanced by the Sheriff asserting that no remedy is required and established the defendant's liability under Title VII, there is no discretion to deny injunctive relief completely. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); United States v. County of Fairfax, VA, 629 F.2d 932, 941-42 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981).

The Government requested injunctive relief[27] and make-whole relief. With respect to the first, the current Sheriff, Sheriff Gregory, argued that, under Virginia law, his administration is legally separate from Sheriff Williams' administration. Therefore, it is contended that injunctive relief as against him is inappropriate because the policy of discrimination practiced by Sheriff Williams no longer exists under the new administration. We reject this argument for both legal and factual reasons.

Under federal law, Title VII remedies have not been limited to correcting only ongoing discriminatory policies.

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[27]The Government requested an injunction against future discrimination as well as an order requiring the Sheriff to make affirmative efforts to recruit women for deputy positions.

District courts clearly have the authority and should exercise the power to grant injunctive relief even after apparent discontinuance of unlawful practices.[28] That is especially true where, as in cases such as the present one, the record does not demonstrate a total cessation of the lawful practices. See United States v. Virginia, 22 Fair Empl. Prac. Cas. BNA) 936, 937 (E.D. Va. 1978), remanded on other grounds, 620 F.2d 1018 (4th Cir.), cert. denied, 449 U.S. 1021 (1980) (injunction will provide

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[28] Title VII states, in pertinent part: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . [the practice may be enjoined] . . . ." (Emphasis added). 42 U.S.C. § 2000e-5(g). See generally Scheli & Grossman, Employment Discrimination Law, at 1415 (2d ed. 1983).

publicity aimed at eliminating lingering effects of discrimination).

Here, the record indicates that the discriminatory practice continues. For example, Sheriff Gregory has not hired a female deputy[29] and he eliminated the civil process server position which Kathy Sheppard occupied under Sheriff Williams. Having found a pattern or practice of discrimination against women applying for deputy positions, the Government need not provide any further evidence to justify an award of prospective relief. Teamsters, 431 U.S. at 361.

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[29]Sheriff Gregory testified that he did not have a discriminatory hiring practice: "I'm going to be guided by a policy that I will not intentionally discriminate against anyone." Sheriff Gregory also testified that he considered the fact that Kathy Sheppard was a woman in deciding whether she should be hired as a corrections officer.

Make-whole relief of back pay and an offer of the next available vacancy as a deputy or a dispatcher, at their option, are requested for Scales and Sheppard, but not for Hylton. Make-whole relief is justified when the Government has shown a practice or pattern of discrimination and the complainant applied for the job during the period when the discriminatory policy operated. The Sheriff could rebut such a prima facie case of individual discrimination by providing a lawful reason for not hiring the applicant. Teamsters, 431 U.S. at 361-62. Although the district court found that the Sheriff had presented lawful reasons for not hiring Scales[30]

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[30]Of the four different versions which Sheriff Williams offered to justify not hiring Scales, who was exceptionally qualified for the position of deputy, the district court relied on her alleged

and Sheppard,[31] after reviewing the record, we believe that the district court clearly erred in assessing the evidence. We find that the Government has shown the Sheriff's reasons to be pretextual. Therefore, reversal is warranted.

In conclusion, the district court should be reversed on its findings that the Sheriff did not have a policy or practice of discriminating against women in filling deputy positions and the case should be remanded for a decision on an appropriate remedy consistent with this opinion.

REVERSED AND REMANDED.

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[30](Cont'd) bad moral and credit reputation and her overbearing personality. Although the district court recognized that other evidence tended to disprove the asserted reputation, it stated that the Sheriff's good faith in relying on the information to protect the public perception of

[30](Contd') his administration justified his decision. However, this Court has refused to expand the "complete but very narrow immunity for employer conduct shown to have been undertaken in good faith in reliance upon an opinion of the EEOC" which the Supreme Court recognized in Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1974). United States v. Gregory, 818 F.2d 1114, 1119 (4th Cir. 1987). The district court erred in relying on the Sheriff's good faith when it realized that the evidence manifestly showed that the Sheriff had no legitimate reason for not hiring Scales.

Other evidence reveals that the Sheriff hired male deputies who had worse credit problems than Scales; had retained two male deputies whose behavior indicated bad moral reputations while firing the female employee associated with those incidents; and had hired male deputies with poor driving records and past criminal records.

[31]Sheriff Gregory did not rehire Sheppard after her job as civil process server was eliminated for budgetary reasons. Despite her excellent job evaluations and her experience, he refused to consider her for one of the two vacant deputy positions nor did he hire her instead for any of the 14 carryover positions. The district court interpreted the Government's position as requiring the Sheriff to "bump" another employee, which the law does not require him to do. However, that is a misinterpretation of the Government's argument. It contends

[31](Cont'd) that Sheriff Gregory refused to rehire Sheppard because, as he stated, her past performance was unsatisfactory. However, the clear evidence shows that she received the highest work evaluations, that her performance was excellent and that she was better qualified than other personnel whom Sheriff Gregory rehired instead.

Appendix "C"

Opinion Rendered: July 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2839

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

JAY GREGORY, Sheriff of Patrick County, a Constitutional Officer of the Commonwealth of Virginia and elected under the laws of the Commonwealth

Defendant - Appellee

and

JESSE WILLIAMS, Sheriff of Patrick County

Defendant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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O R D E R

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a

requested poll of the Court, Judges Russell, Widener, Chapman, and Wilkins voted to rehear the case in banc; Chief Judge Ervin and Judges Winter, Hall, Phillips, Sprouse, and Murnaghan voted against rehearing the case in banc. Judge Wilkinson was disqualified from participation. As a majority of the Judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Hall and Judge Howard, United States District Judge for the Eastern District

of North Carolina sitting by designation.

For the Court,

/s/ John M. Greacen
CLERK